No. 352

In the Supreme Court of the United States

October Term, 1950

The Timken Roller Bearing Company, appellant

v.

The United States of America

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO EASTERN DIVISION

Civil Action 24214

UNITED STATES OF AMERICA, APPELLEE

v.

THE TIMKEN ROLLER BEARING COMPANY, APPELLANT

STATEMENT IN OPPOSITION TO APPELLANT'S STATEMENT OF JURISDICTION AND MOTION TO DISMISS OR AFFIRM

Appellee, pursuant to paragraph 3 of Rule 12 of the revised Rules of the Supreme Court of the United States, moves that the appeal be dismissed or that the Final Judgment of the District Court be affirmed.

This is a direct appeal from the Final Judgment of the United States District Court for the Northern District of Ohio, entered on February 15, 1950, which granted injunctive relief under Section 4 of the Sherman Act with respect to an unlawful conspiracy in restraint of trade, engaged in by the appellant, in the manufacture, sale and distribution of anti-friction bearings.[1]

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[1] As defined in Section 1 A of the Final Judgment, "'Anti-friction bearings' means rotating devices for reducing friction between moving mechanical parts, wherein rollers of various shapes or balls are inserted between containers which are inserted between moving parts. . . ."

In a memorandum opinion, filed March 3, 1949 (83 F. Supp. 284), after trial of the action, the District Court found that appellant had violated Sections 1 and 3 of the Sherman Act by forming a cartel with a British and a French producer of anti-friction bearings, both of whom were named as co-conspirators, whereby appellant and its co-conspirators eliminated competition among themselves and with others by dividing among themselves world markets for the production and sale of anti-friction bearings.

A hearing on the relief in this case was held before the District Court September 28 to October 3, 1949. The Court handed down its Final Judgment on February 15, 1950. The Judgment aimed at severing the ties among the co-conspirators, and enjoined any further concerted action between them. Further provisions had as their objective the restoration of competition in the field of the manufacture, sale, and distribution of anti-friction bearings.

MOTION TO DISMISS

Appellee moves, pursuant to paragraph 3 of Rule 12 of the Revised Rules of the Supreme Court of the United States, that this appeal be dismissed because the excessive number of assignments of error makes it impossible to determine the grounds upon which the appellant relies for a reversal of the District Court's Judgment, and this deficiency is not cured by certain broadly stated propositions in appellant's jurisdictional statement. Cf., *Local 167* v. *United States,* 291 U. S. 293, 296.

The 206 assignments of error, covering 67 typewritten pages, advanced by the appellant constitute

a promiscuous attack upon virtually everything done by the District Court.

The most appropriate remarks applicable to this undigested mass are those made by Mr. Justice Miller in *Phillips & Colby Construction Co.* v. *Seymour,* 91 U. S. 646, 648, in referring to only 52 assignments of error:

> "This practice of unlimited assignments is a perversion of the rule, defeating all its purposes, bewildering the counsel of the other side, and leaving the Court to gather from a brief, often as prolix as the assignments of error, which of the latter are really relied on."

This language was approvingly cited in *Chesapeake & Delaware Canal Co.* v. *U. S.,* 250 U. S. 123, in which there were only forty-one assignments. Finally, in *Local 167* v. *United States,* 291 U. S. 293, the Court warned the bar that in the future such an assignment of errors would be ground for dismissal, saying (p. 296):

> The assignment of errors includes more than 250 specifications and occupies more than 35 pages of the record. While it is possible to find among them bases for the five points indicated, they contain so much that is irrelevant that they tend to confuse rather than to define the issues to be presented. They do not appropriately serve the convenience of the appellee or of the court. *Phillips & Colby Const. Co.* v. *Seymour,* 91 U. S. 646, 648. *Central Vermont Ry.* v. *White,* 238 U. S. 507, 508. *Chesapeake & Del. Canal Co.* v. *United States,* 250 U. S. 123, 124. *Seaboard Air Line Ry.* v. *Watson,* 287 U. S. 86, 91. In view of the omission of appellee to object and the lack of precedent definitely in point we refrain from dismissing

the appeal for failure substantially to comply with the statute and our rule in respect of the assignment of errors. 28 U.S.C., § 862. Rule 9. But what is here said is to be understood as an announcement that in the future a failure of that sort may be taken as sufficient ground for dismissal.

MOTION TO AFFIRM

Appellee, pursuant to paragraph 3 of Rule 12 of the Revised Rules of the Supreme Court of the United States, moves that the Final Judgment of the District Court be affirmed for the reason that the appeal from said Judgment presents no substantial question for consideration.

In its jurisdictional statement, appellant claims that this case involves two basic and fundamental legal questions of vital importance to American businessmen.

First, appellant claims that the restraints imposed by the territorial allocations were reasonably ancillary to a "joint venture in the general nature of a partnership" between the appellant and a British subject. Nowhere is this legal entity, "joint venture in the general nature of a partnership," defined, but appellant declares that the Supreme Court approved this contention in *United States* v. *Bausch & Lomb Optical Co.*, 321 U. S. 707. The Supreme Court did affirm *United States* v. *Bausch & Lomb Optical Co.*, 45 F. Supp. 387 (S.D. N.Y.), in which the words "joint venture" were casually used, but no fair analysis of the business arrangement discussed in this latter case would make it applicable to the present case. The District Court in the *Bausch & Lomb* case found reasonable a *vertical* selling arrangement between manufacturer and

distributor. Here, we find a *horizontal* arrangement among existing competing manufacturers which resulted in an allocation of sales territories throughout the world. Ever since *United States v. Addyston Pipe & Steel Co.*, 85 Fed. 271 (6th Cir.), aff'd. 175 U. S. 211, this has been illegal *per se*. Where there is a *per se* violation, the doctrine of ancillary restraints can have no application. That doctrine can only be brought into play where the issue of the reasonableness of the restraint is still open. Historically, the ancillary doctrine was based upon the seller of a business agreeing for a period of time not to compete with the buyer. This protects the buyer's investment in a reasonable manner which is in the public interest. But this situation has nothing to do with the present case. The District Court correctly disposed of this attempt to becloud with semantics by stating that "regardless of the descriptive term used," (par. 150) this was an illegal contract in restraint of trade. Therefore, there is no substantial, significant, or important question involved in this issue.

The second important question alleged to be involved in this case is the right of an American company to license the use of its trademark "Timken" abroad on a territorial basis. Whatever right an American company might have to license its trademark abroad, it would have this right only upon a *national* basis and then only if (1) the law of the nation in question permits the licensing of trademarks, and (2) the American company complies with the requirements of such law.

But regardless of the law governing the licensing of trademarks abroad, that question is not involved

in this case. Appellant does not own the mark "Timken" in such important areas of potential competition as Great Britain, France and Germany. British Timken and French Timken were and are the registered owners of that mark in their respective countries (Pl. Ex. 149) and British Timken owns the mark in Germany. As the District Court said: "Defendant did not and could not have a right to license a trademark in markets where it did not own the mark." (Par. 190) In fact, appellant is at present taking steps to obtain a license of the mark in Great Britain from British Timken. (D. Ex. D (decree))[2] Hence, with respect to those countries where the problem posed might be of importance to the American business man, that is, in the major industrial nations of the world, appellant has not licensed and could not license the mark; therefore the question of the right of an American corporation to *grant* a trademark license in these countries is not involved in this case.

Further, the Final Judgment does nothing to interfere with this right to license the mark. Sec. VII of the Judgment, the only provision dealing with trademarks, enjoins appellant from entering into any contract with its co-conspirators which provides for the transfer of any right under a trademark upon condition that the co-conspirators allocate or divide territories or markets or engage in other enumerated restrictive practices.

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[2] Further, appellant has advised the Court that it would become a licensee of the mark "Timken" in other countries when a law permitting it to do so is passed. (D. Ex. D (decree)).

Even in those areas where appellant has the registration of the trademark, that is, areas other than the major industrial countries, such as Great Britain, France and Germany, and in which appellant might presumably license the mark, appellant may not license legally under any agreement which allocates markets throughout the world. It is well settled that the allocation of territories cannot be justified as ancillary to the grant of a license under a patent. *United States* v. *National Lead,* 63 F. Supp. 513, aff'd. 332 U. S. 319; *Ethyl Gasoline Corp.* v. *U.S.,* 309 U. S. 436, 456. Nor can a copyright be used to restrain commerce and suppress competition. *Interstate Circuit, Inc.* v. *U. S.,* 306 U. S. 208; *U. S.* v. *Paramount Pictures,* 334 U. S. 131, 143. Even less can a trademark owner impose such restrictions, for, as was said in *United Drug Co.* v. *Rectanus Co.,* 248 U. S. 90, 98, "The owner of a trademark may not, like the proprietor of a patented invention, make a negative and merely prohibitive use of it as a monopoly." If a patent license will not support an allocation of markets, it must follow that the lesser right, that is, the trademark will not do so either. The reason is, of course, that an allocation of sales territories is a *per se* violation of the Sherman Act. The rule is of universal application that, upon finding a *per se* violation, all discussion as to reasonableness is precluded. This is so whether the ancillary restraint imposed flows out of a patent license, a joint venture, or a trademark license.

Turning now to the appellant's assignments of error, the omnibus and indiscriminate nature of appellant's assignments makes it impossible to

focus attention on any particular points of fact or law. The appellant here objects to 83 of the Court's Findings of Fact. However, the basic agreements establishing this cartel in 1938 (Pl. Ex. 26 and 27) showed on their faces a division of markets and sales territories. The remaining evidence showed conclusively that these agreements were carefully adhered to over a period of many years.[3] The District Court's Findings were amply supported by the evidence in the case. To reconsider all these assignments on factual issues would amount to a needless retrial of the case. The Supreme Court in *United States* v. *Yellow Cab Co.*, 338 U. S. 338, refused to try a case *de novo* on the record, reject nearly all the findings of the trial court, and substitute contrary findings of its own.

The conclusions of law made by the District Court with respect to these facts are plainly correct and amply supported by authority. Appellant objects specifically to 62 of these conclusions. Not one of these objections, so far as can be discerned, raises a substantial or novel point of law. The facts of this case demonstrate that what is here involved is a typical international cartel, involving the allocation of territories among competitors to eliminate competition among themselves. As pointed out above, for over fifty years such restraints have been illegal *per se*. *United States* v. *National Lead Co.*, *supra*; *United States* v. *Addyston Pipe & Steel*

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[3] In appellee's answer to appellant's unsuccessful motion for a new trial, dated March 16, 1950, appellee pointed to the page or exhibit in the trial record which supported 71 of these 83 findings objected to. The 12 new objections here made by the appellant are equally negated by an actual reference to the trial record.

Co., supra. In short, the legal questions that might be raised by this appeal involve only already settled law and contain nothing of substantiality or novelty.

Appellant has assigned as error each and every provision of the Final Judgment in this case—30 assignments in all. Many of the provisions are objected to more than once. The inevitable result of such an unselective attack is that many of these assignments are frivolous. For instance, the appellant claims that the Court, sitting as an equity court, was in error in retaining jurisdiction in this case (Assignment 37).[4] Appellant also claims that the Court erred in taxing costs against the appellant (Assignment 38).[5]

The only issue that arises with respect to a final judgment is whether or not the District Court has abused its discretion, for, as was said in the *National Lead* case: "the provisions of this decree, to a large extent, are matters lying within the discretion of the District Court as a court of equity whose duty it was to make the remedy as effective

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[4] The frivolous character of this assignment is readily demonstrated by reference to a previous decision of the Supreme Court:

> "Power to modify the decree was reserved by its very terms, and so from the beginning went hand in hand with its restraints. If the reservation had been omitted, power there still would be by force of principles inherent in the jurisdiction of the chancery. A continuing decree of injunction directed to events to come is subject always to adaptation as events may shape the need." *U. S. v. Swift & Co.*, 286 U.S. 106, 114.

[5] This is claimed as error in spite of the plain language of Rule 54 (d) of the Federal Rules of Civil Procedure: "Costs shall be allowed as of course to the prevailing party unless the court otherwise directs."

as possible." 332 U. S. at 334.[6] The established facts of this case and the law applicable to such facts make it clear that no such abuse can be validly claimed in the present cause.

In its jurisdictional statement, the only question raised by the appellant with respect to the Final Judgment concerned the District Court's order that appellant divest its stockholdings in the co-conspirators. Appellant claims that it neither illegally acquired nor illegally used these holdings. Both of these contentions are contrary to the facts of this case. The agreement (D. Ex. 15) which provided for the purchase of British Timken stock by appellant likewise provided, "in connection therewith," for the continuation of the existing agreement dividing world territories. The stock interest in French Timken was similarly acquired. Thus the acquisitions were illegal because immediately connected with the *per se* violation of the Sherman Act.

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[6] In the proper exercise of its discretion in providing effective and adequate relief in antitrust cases, the District Court should strive to achieve certain end results. First, it should enjoin the unlawful practices. *Ethyl Gasoline Corp.* v. *United States*, 309 U.S. 436, 461 (1940). This was done in the present Judgment by, for example, enjoining the allocation of territories (Final Judgment, V A). Secondly, it should order the undoing of the conditions created within the industry by the unlawful practices. In the present Judgment, the divestiture of appellant's stock holdings in the co-conspirators was ordered in accordance with this objective (Final Judgment, VIII A). And thirdly, it should seek to restore competition in the industry affected. *International Salt Co.* v. *United States*, 332 U.S. 392 (1947). Among the provisions in the present Judgment directed to this end are those ordering advertising in the territories formerly allocated to co-conspirators (Final Judgment, X A), and prohibiting refusals to sell in those territories (Final Judgment, IX).

Appellant also made illegal use of these holdings in the co-conspirators. Although its holdings in British Timken and French Timken did not give appellant control of those companies,[7] they did serve as a means of influencing the suppression of competition among the three companies and encouraging the continued adherence to the agreements. This influence was exercised, in the case of British Timken, by the appellant having one director on that Company's board of four members. An example of its exercise occurred in 1935, when appellant used this influence to bring about a thirty-year extension of the agreements (Tr. of Trial 1962-66; Def. Ex. 131-135). The investments likewise served as an inducement to appellant not to compete with the companies whose stock it held in such substantial amounts (Tr. of Trial 2584, 2784-5). Divestiture on these grounds was approved in *United States* v. *Crescent Amusement Co.*, 323 U. S. 173; *United States* v. *National Lead Co., supra*; *United States* v. *Paramount Pictures, Inc.*, 334 U. S. 131.

In short, there is no substantial question of fact or law raised by this appeal, nor can it be sustained that the Court abused its discretion in the Final Judgment rendered by it.

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[7] Appellant's holdings did not give it control of British Timken and French Timken, respectively, because a British subject, N. B. U. Dewar, also had substantial holdings in those companies, and by contract with appellant was to retain control of them as long as profits remained at a specified level. Under these arrangements, Dewar maintained operating control of British Timken and French Timken at all times during the joint ownership. (Tr. of Trial 935, 2526-2532; D. Exs. 26, 187, 228, 249).

PRAYER FOR DISMISSAL OR AFFIRMANCE

For the reasons stated it is respectfully submitted that the appeal should be dismissed, or that the Final Judgment of the District Court should be affirmed.

(S.) PHILIP B. PERLMAN,
Solicitor General.

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